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No. 684

In the

Supreme Court of the United States

OCTOBER TERM, 1959

HELEN MARY ROBINSON, ADMINISTRATRIX,
Petitioner,

vs.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO [redacted] AND THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS AT FORT WORTH, [redacted].

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No.

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HELEN MARY ROBINSON, ADMINISTRATRIX,
Petitioner,

v.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS AND THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS AT FORT WORTH, JOINTLY OR IN THE ALTERNATIVE.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, HELEN MARY ROBINSON, ADMINISTRATRIX, prays that a Writ of Certiorari issue to review jointly and in the alternative the Judgment of the Court of Civil Appeals for the Second Supreme Judicial District

of Texas at Fort Worth entered in the above entitled cause on May 15, 1959 (Petitioner's Motion for Rehearing in said cause having been denied by said Court of Civil Appeals on June 26, 1959), and the Order of the Supreme Court of the State of Texas entered in the above entitled and numbered cause on October 7, 1959, refusing Petitioner's Application for Writ of Error (Petitioner's Motion for Rehearing of such Application for Writ of Error in said cause having been denied on November 11, 1959).

I. REPORT OF THE OPINION OF THE COURT BELOW

The Opinion of the Court of Civil Appeals for the Second Supreme Judicial District of Texas at Fort Worth (R. IV), printed in Appendix A hereto, infra., Page 21, is reported in 325 S. W. 2d 432. The Order of the Court of Civil Appeals denying the Motion for Rehearing (R. V), printed in Appendix B hereto, infra., Page 31, is not reported. The Order of the Supreme Court of Texas refusing Petitioner's Application for Writ of Error (R. IX), printed in Appendix B hereto, infra., Page 33, is not reported. The Order of the Supreme Court of Texas overruling Petitioner's Motion for Rehearing of her Application for Writ of Error (R. IX), printed in Appendix B hereto, infra., Page 35, is not reported.

II. GROUNDS ON WHICH JURISDICTION IS INVOKED

1. The final judgment of the Court of Civil Appeals for the Second Supreme Judicial District of Texas at Fort

Worth was rendered and entered on May 15, 1959, Appendix B hereto, infra., Page 29 (R. V). The Order overruling Petitioner's Motion for Rehearing by said Court of Civil Appeals was rendered and entered on June 26, 1959, Appendix B hereto, infra., Page 31 (R. V).

2. The Order of the Supreme Court of Texas refusing Petitioner's Application for Writ of Error was rendered on October 7, 1959, Appendix B hereto, infra., Page 33 (R. IX). The Order overruling Petitioner's Motion for a Rehearing of her Application for Writ of Error was rendered and entered on November 11, 1959, by the Supreme Court of Texas, Appendix B hereto, infra., Page 35 (R. IX).

3. The jurisdiction of this Court is invoked under *28 U. S. C., Section 1254(3)*, since a right and privilege is specially set up and claimed under the Constitution and Statutes of and under authority exercised under the United States and under *45 U. S. C., Section 51, et seq.*

III. QUESTIONS PRESENTED

1. Whether the failure of a railway company to furnish its injured employee a reasonably safe place in which to work is a question which should be submitted to the jury in an action brought in a state court under the *Federal Employer's Liability Act, 45 U. S. C., Section 51, et seq.?*

2. Whether a state court, in an action brought under the *Federal Employer's Liability Act, 45 U. S. C., Section 51, et seq.*, deprives the injured employee of his right of

trial by jury by refusing to submit to the jury the issue of the failure of the employer to furnish the employee with a reasonably safe place in which to work, where such issue is raised by the evidence?

3. Whether under the *Federal Employer's Liability Act* the jury has a greater power to draw inferences than under the common law?

IV. STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

1. The Constitutional provision involved in this case is the Seventh Amendment to the Constitution of the United States reading as follows:

> "In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

2. The statutory provision involved in this case is the *Federal Employer's Liability Act, 45 U. S. C., Section 51, et seq.*, and more specifically involved in this petition is that portion of *45 U. S. C., Section 51*, which reads as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in

such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

V. STATEMENT

1. Material Facts:

Petitioner, Helen Mary Robinson, brought this suit against Respondent, Gulf, Colorado and Santa Fe Railway Company, under the *Federal Employer's Liability Act, 45 U. S. C., Section 51, et seq.*, to recover for damages for the death of her husband while in the regular course and scope of his employment with Respondent.

The deceased was killed when the train on which he was working as fireman collided with a county asphalt truck at the point in Tarrant County, Texas, where defendant's track is crossed by Avondale School Road.

In her petition in the trial court, Petitioner alleged that Respondent was negligent in failing to furnish her deceased husband with a reasonably safe place in which to work as an employee of Respondent and further alleged that the Railway Company was negligent in other particular respects.

The evidence and the reasonable inferences to be drawn therefrom showed that the Avondale Crossing would have first come into the engineer's view approximately one and one-half (1½) miles from the Crossing; that the train approached the Crossing at a speed of approximately eighty-four (84) miles per hour; that one crossing the Crossing going west, as was the asphalt truck driver, would view the train head-on in an attitude almost impossible to judge or estimate its speed of approach with any degree of certainty whatever; that the opportunity to observe the speed of the train would be limited at most to seconds; that after rounding the curve a mile and a half away that within approximately sixty (60) seconds the train would, at the speed at which it was travelling, be moving across the Avondale Crossing; that under the circumstances created by Respondent that one using the Crossing would have to be most attentive and alert in order to safely use the Crossing; that the whistle on the train was inadequate to warn of its approach as it was not heard by the passenger on the asphalt truck but that if the train whistle were heard that one would have no more than ten (10) seconds to get across the Crossing; that the Crossing was marked only by a simple, old-fashioned, cross-buck railroad sign reading "Railroad Crossing"; that there was no flashing or other signal existent to give visual or other warning to those at the Crossing of the approach of any train nor was there an arm gate device; that a collision at the Crossing could derail the locomotive and otherwise endanger the lives of the engineer and fireman working thereon; that the engineer was a man almost seventy-four

(74) years of age and was not physically or mentally capable of safely operating Respondent's train under the conditions existent at the Crossing and the speed of the train; that Respondent did not warn the persons in charge of its train that the Avondale Crossing was dangerous at the time and place in question in view of the road repair works going on around such crossing; that all the means at hand were not used to stop or slow the train immediately prior to the collision in question; and that Respondent knew or should have known of the existence of all of such facts, circumstances, and conditions.

The evidence further showed that, regardless of the causation of the collision itself, that Respondent failed to furnish deceased a safe place to work in that there was no interior damage to the cab except by fire; that there would have been no injury or resulting death to the deceased had it not been for the fire inside the cab; that the door of the cab had been tied back; that a door of the cab would not close; that a window of the cab was open and that if the doors and windows of the cab had been closed at the time of the collision, which cab was under the control of defendant's engineer and defendant's conductor, that the fire probably would not have occurred in the cab and that the deceased would still be alive today.

The Trial Court submitted to the jury special issues concerning specific acts of negligence of the Railway Company which issues were answered favorable to the Railway Company. The jury further found in answer to a special issue submitted that the accident as between the deceased,

and Respondent was the result of an unavoidable accident and further found that the sole proximate cause of the accident were actions on the part of the driver of the asphalt truck.

However, the Trial Court failed to submit to the Jury issues concerning whether or not Respondent failed to furnish the deceased with a reasonably safe place in which to do his work, which issue was raised by the evidence as a whole, and in particular, was raised by evidence not embraced within the specific negligence issues submitted. Specifically not covered by the negligence issues submitted to the jury were issues concerning the condition of the cab itself; the sufficiency of the train's whistle; the use of all the means at hand to stop the train; the fitness of the engineer; and the sufficiency of warning of danger.

Based upon the jury's verdict the Trial Court rendered a judgment for Respondent that Petitioner take nothing, from which judgment Petitioner duly perfected her appeal to the Court of Civil Appeals for the Second Supreme Judicial District of Texas at Fort Worth.

Upon appeal, the Court of Civil Appeals disregarded the evidence showing that the issue should have been submitted inquiring as to the failure of Respondent to furnish deceased with a safe place in which to do his work and affirmed the judgment of the Trial Court. The Texas Supreme Court refused to grant Petitioner's Application for Writ of Error.

2. How Federal Question Was Presented in the State Courts.

The Constitutional and Federal questions forming the basis of this petition to this Honorable Court were urged upon the State Courts as follows:

A. *Trial Court.*

Petitioner first raised a Federal question in her Original Petition, which Federal question was carried through in her First Amended Original Petition, each of which Petitions alleged in Paragraph I:

> That Petitioner brought this action "under the Federal Employer's Liability Act, Sections 51, et seq., Title 45, U. S. Code, Annotated * * *."

In Paragraph V of such Petitions it was alleged as follows:

> "At the time of the collision described in the preceding paragraph, Grady Farris Robinson, as the agent, servant and employee of the Gulf, Colorado and Santa Fe Railway Company was then and there a member of the train crew of the defendant company which was hauling passengers in interstate commerce on the main line of said railway company, which main line extended from Texas into the States of Oklahoma, Kansas, Missouri, Illinois and other states, so that the duties of Grady Farris Robinson were at such time described above the furtherance of interstate commerce by reason of which the said Employer's Liability Act governs the cause of action here asserted against Gulf, Colorado and Santa Fe Railway Company."

After the completion of the evidence, Petitioner requested that the Trial Court submit issues on the failure of Respondent to provide Grady Farris Robinson with a safe

place to work, which the Trial Court refused (R. I-60). The Court's error in refusing the submission of such issues was preserved for appeal by Petitioner assigning in her Motion for New Trial that the Trial Court erred in refusing to submit such issues. (R. I-83.) Petitioner further stated in her Motion for New Trial as follows:

> "The Charge of the Court as presented to the jury withdrew from consideration of the jury the prime, principal and controlling issues as to the negligence of defendant, and denied plaintiff a trial by jury on the whole of the cause of action brought by her under the Federal Employer's Liability Act, presented in her pleadings and established by the evidence and proof in the case, in that the Court resolved against plaintiff as a matter of law all such prime, principal and controlling issues, particularly on the question of the failure of the defendant to provide a reasonably safe place for the decedent to work, and its failure to install at the crossing some character of warning device to protect the train and its crew." (R. 82-83.)

B. *The Court of Civil Appeals for the Second Supreme Judicial District of Texas at Fort Worth.*

The Federal question was next presented by Petitioner's Brief (R. III) as submitted to the Court of Civil Appeals for the Second Supreme Judicial District in which Petitioner's First Point of Error was with reference to the Trial Court's refusing to submit Petitioner's Requested Issues on defendant's failure to provide Grady Farris Robinson with a safe place to work. This Point of Error was duly carried along in Petitioner's Motion for Rehearing (R. VI) and Amended Motion for Rehearing (R. VII) each of which also assigned as error the Court's refusal to submit such

issues, being the controlling issues in a Federal Employer's Liability Act case.

The Court of Civil Appeals affirmed the Trial Court's judgment (R. V) and overruled Petitioner's Motion for Rehearing (R. V).

C. *Supreme Court of Texas.*

After Petitioner's Motion for Rehearing was overruled by the Court of Civil Appeals, Petitioner filed her Application for Writ of Error to the Supreme Court of Texas. In this Application, Petitioner brought forward the Point of Error to the effect that the Trial Court erred in refusing to submit to the jury the requested issues on the employer's failure to provide Grady Farris Robinson with a safe place to work (R. VIII).

The Supreme Court refused Petitioner's Application for Writ of Error (R. IX), and Petitioner filed a Motion for Rehearing (R. X) which again brought to the attention of the Supreme Court the Points brought forward in Petitioner's Application for Writ of Error. The Supreme Court of Texas subsequently overruled Petitioner's Motion for Rehearing of her Application for Writ of Error (R. IX).

VI. REASONS FOR GRANTING THE WRIT

1. The refusal of the Trial Court to submit to the jury issues on the failure of Respondent to furnish the deceased, Grady Farris Robinson, with a safe place to work; the decision of the Court of Civil Appeals affirming the judgment of the Trial Court which was based upon a jury

verdict which did not give the jury the opportunity to pass upon the issue of the failure of Respondent to furnish the deceased with a safe place to work; and the refusal of the Supreme Court of Texas to grant an Application for Writ of Error are not in accord with the applicable decisions of this Court.

The decisions and judgments of the State Courts herein are in direct conflict with the holdings of this Court which hold that it is a question for a jury to determine whether an employer under the Federal Employer's Liability Act is liable for injuries to an employee by virtue of the employer's failing to furnish the employee a reasonably safe place in which to do his work, particularly where the employer knew or should have known of the dangerous condition existing. *K. L. Cahill v. New York, New Haven and Hartford Railroad, 76 S. Ct. 180; Lillie v. Thompson, 332 U. S. 459; Smalls v. Atlantic Coast Line R. Co., 348 U. S. 946;* and *Schulz v. Pennsylvania R. Co., 76 S. Ct. 134 and 608.* Also of major importance in this regard are other recent cases decided by this Court. *Arnold v. Panhandle & SFR Co., 353 U. S. 360, 77 S. Ct. 840; Rogers v. Missouri Pacific R. Co., 352 U. S. 500, 77 S. Ct. 443; Webb v. Illinois Central R. Co., 352 U. S. 512, 77 S. Ct. 451; Shaw v. Atlantic Coast Line R. Co., 353 U. S. 920, 77 S. Ct. 680; Futrelle v. Atlantic Coast Line R. Co., 353 U. S. 920, 77 S. Ct. 682; Deen v. Gulf, C. & S. F. R. Co., 353 U. S. 925, 77 S. Ct. 715; Thompson v. T. & P. R. Co, 353 U S. 926, 77 S. Ct. 698; Ringhiser v. Chesapeake & OR Co., 354 U. S. 901, 77 S. Ct. 1093; McBride v. Toledo Terminal R. Co., 354 U. S. 517, 77 S. Ct. 1398; Gibson v. Thompson, 355*

U. S. 18, 78 S. Ct. 2; Honeycutt v. Wabash R. Co., 355 U. S. 424, 78 S. Ct. 393; Ferguson v. St. Louis San Francisco R. Co., 356 U. S. 41, 78 S. Ct. 671; Moore v. Terminal Railroad Association, 358 U. S. 31, 79 S. Ct. 2; Harris v. Pennsylvania R. Co., 80 S. Ct. 22; Conner v. Butler, 80 S. Ct. 21.

2. The failure of the Trial Court to submit the ultimate issue of the failure of Respondent to furnish deceased a safe place to work and the failure of the Texas Court of Civil Appeals and the Texas Supreme Court to reverse the Trial Court's Judgment constituted an invasion of the province of the jury contrary to the Seventh Amendment to the United States Constitution.

Under the law as enunciated by the Supreme Court of Texas, the theories of each party must be directly submitted where raised by the evidence and such right cannot be lost or defeated even though jury findings on other issues in effect indirectly negative a favorable finding on an issue not submitted, but raised by the evidence. *Blanton v. E & L Transport Company, et al., 207 S. W. 2d 368 (S. Ct. of Tex.).*

As set forth in the Statement hereof, clearly the evidence raises the issue of whether or not the defendant railway company failed to furnish Petitioner's deceased husband a reasonably safe place in which to do his work, from which evidence the jury would have been more than justified in making a favorable finding to Petitioner on the reasonably safe place to work issues. Thus, the refusal of the Trial Court to submit to the jury the issue as to the failure of Respondent to furnish the deceased a safe place in which

to do his work and the affirmance by the Court of Civil Appeals and the Texas Supreme Court of the Trial Court's judgment even though the evidence raised such issue clearly constitute invasions of the jury's province. Such invasions certainly are in abrogation of the decisions of this Court, particularly in view of those decisions to the effect that the jury's power to draw inferences is greater under the Federal Employer's Liability Act than a common law. When an injured railway employee has been deprived of his constitutional right of trial by jury, this Court has on many occasions jealously restored this right. *Bailey v. Central Vermont R. Co., 319 U. S. 350, 63 S. Ct. 1062; Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 63 S. Ct. 444; Tennant v. Peoria & PU Ry. Co., 321 U. S. 29; Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740; Schulz v. Pennsylvania R. Co., 350 U. S. 253, S. Ct. 608,* to mention but a few.

Therefore, it is respectfully submitted that the Trial Court, the Texas Court of Civil Appeals and the Supreme Court of Texas, in taking away the substantive rights of Petitioner's deceased husband which were granted under the Federal Employer's Liability Act, in refusing to submit to the jury the failure of Respondent to furnish the deceased with a safe place to work, substituted themselves as triers of facts, thereby invading the province of the jury contrary to the rights of Petitioner as granted Petitioner under the Seventh Amendment to the Constitution of the United States.

3. The action of the Trial Court, the Texas Court of Civil Appeals and the Texas Supreme Court in refusing to recognize Petitioner's right to a jury determination of the failure of Respondent to furnish Petitioner's deceased husband with a safe place to work raises an important question of Federal law which has not clearly been, but should be, specifically determined by this Court.

It appears that the Trial Court in its judgment on the jury's verdict and the Court of Civil Appeals in its opinion were following the time honored "proximate cause" theories as they are applicable in the ordinary damage suit without taking into consideration the letter and spirit of the Federal Employer's Liability Act.

The Federal Employer's Liability Act states that every railroad shall be liable in damages for injuries resulting "in whole or in part from the negligence" of the railroad. Thus, the question is presented as to whether or not in cases tried under the Federal Employer's Liability Act the issue of whether or not the employee's injuries were proximately caused by the negligence of the railroad is properly submitted to the jury or whether the test is merely if such negligence "in part" caused such injuries.

Cases by this Honorable Court such as *Griswold v. Gardner, 329 U. S. 725, 67 S. Ct. 74; Cogswell v. Chicago & E&I R. Co., 328 U. S. 820; Coray v. Southern Pacific Company, 335 U. S. 520; Carter v. Atlantic & St. Andrews Bay Ry. Co., 338 U. S. 430;* and *Spokane & M&R R. v. Campbell, 241 U. S. 497,* indicated that the question of proximate cause in the common law sense should not be in a case brought under the Federal Employer's Liabiiity

Act. The Courts of Texas, as well as many of her sister states, apparently base their decisions on whether or not the negligence of the defendant proximately caused the event as a result of which the employee was injured, when, in fact, under the terms of the Federal Employer's Liability Act the inquiry should be whether or not employer negligence "in part" caused such injuries. This indication should certainly be clarified by a specific holding by this Court since it is an important question of Federal law arising in all Federal Employer's Liability Act cases which has not been, but should be, definitely determined by this Court.

4. The questions here presented have great importance and far reaching effect.

There are many, many thousands of employees, who, when they might have the misfortune of being injured in the course and scope of their employment for a railroad company, will of necessity have their claims determined in both State and Federal Courts under the terms and provisions of and decisions rendered under the Federal Employer's Liability Act, and the possible claims of all these individuals will certainly be affected by the decision of the Texas Court of Civil Appeals below with such decision more particularly affecting the rights and claims of those individuals who might have the misfortune of being injured in Texas while in the employment of a railroad.

For this reason alone, it is essential that this Court grant this Writ in order to rectify the inequitable situation created by the decision of the Court of Civil Appeals and in

effect approved by the Supreme Court of Texas, and in this connection it is respectfully submitted that this Court should specifically direct that the ultimate issue in Federal Employer's Liability Act cases is whether or not the employer failed to furnish its injured employee with a safe place in which to do his work.

5. The decision of the Texas Court of Civil Appeals, with effectual approval by the Supreme Court of Texas, affirming the Trial Court's judgment was clearly erroneous.

For the sake of brevity, Petitioner will not set forth the evidence which, in addition to the evidence considered by the jury on issues submitted to it, conclusively showed that Petitioner was entitled to the submission of her requested issues concerning the failure of Respondent to furnish Petitioner's deceased husband with a safe place in which to do his work. However, Petitioner does respectfully again call the Court's attention to the "Material Facts" as herein set forth supra for a recitation of a portion of such evidence. However, in addition to such evidence the State Courts should have also considered the evidence bearing on the issues submitted in determining whether or not issues on the failure of Respondent to furnish Petitioner's deceased husband with a safe place in which to do his work should have been submitted.

For, when taking the evidence which the jury had no opportunity to consider which had bearing on the safety of the place furnished by Respondent to Petitioner's deceased husband, alone, or considering the evidence which had bearing only on the issues submitted to the jury on Re-

spondent's negligence, alone, or in considering both characters of evidence together, there remains no question but that the Trial Court should have submitted to the jury issues concerning the failure of Respondent to furnish Petitioner's deceased husband with a safe place in which to do his work. The situation as here presented falls squarely within the holding of this Court in *Blair v. B&O Ry., 323 U. S. 600, 65 S. Ct. 1528*, wherein it was held, in effect, that where the several elements, taken as a whole, are so closely interwoven as to form a single pattern and where one element imparts character to the other, the jury would clearly have the right to take into consideration the overall situation in determining that the railway company had failed to furnish Petitioner's deceased husband a reasonably safe place in which to perform his work. Without going into detail, a portion of these overall factors concern generally the 84 mile per hour speed at which the train was traveling; the slight time within which the train would be in view of the crossing prior to reaching the crossing; the failure of the railway to have adequate warning and signaling devices at the crossing; the failure of the railway to have a sufficiently audible whistle on the train; the county road work going on around such crossing; the failure to use all the means at hand to stop or impede the progress of the train; the physical and mental condition of the engineer; and the open windows and tied-back doors of the cab in which the deceased was riding. The existence of all of such facts, circumstances and conditions was admittedly known by Respondent or, under the evidence, should have been known by Respondent.

As hereinbefore stated, under the Texas law in determining whether or not an issue should have been submitted, the findings of the jury on other issues shall not be considered. However, as conclusively shown by the above described facts, circumstances and conditions, even the findings of the jury on the special issues, not to mention the evidence as a whole, did not exhaust all the possible grounds on which a finding favorable to Petitioner on her requested issues concerning Respondent's failure to furnish Petitioner's deceased husband with a safe place to work might have been based. *Arnold v. Panhandle & Santa Fe Ry. Co., 353 U. S. 360, 77 S. Ct. 840.*

Without a doubt, this is another prime example where "in Federal Employer's Liability Act cases that an indifferent or unfriendly attitude had permeated with a philosophy hostile to that reflected in the legislation." *(Mr. Justice Douglas, Stare Decisis, 49 Columbia Law Review, 735, 752.)*

In conclusion, for the foregoing reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the Court Below

In the

COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS, AT FORT WORTH

No. 15998

HELEN MARY ROBINSON, ADMINISTRATRIX,
Appellant,

v.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY,
Appellee

Opinion By Mr. Renfro, A.J.

May 15, 1959

The plaintiff, Helen Mary Robinson, brought suit against the Gulf, Colorado and Santa Fe Railway Company, under the Federal Employers' Liability Act, 45 U. S. C. A., sec. 51 et seq., for damages for the death of her husband while in the scope of his employment with the defendant.

The deceased was killed when the train on which he was working as fireman collided with a County asphalt truck on Avondale School Road in Tarrant County.

Following a verdict and judgment in favor of defendant Railway Company, the plaintiff appealed.

The controlling question is whether the trial court erred in refusing to submit to the jury Requested Issue No. 1(a): "Do you find from a preponderance of the evidence that the defendant on the occasion in question failed to provide Grady Farris Robinson with a safe place to work?", with accompanying issues on negligence and proximate cause.

Plaintiff's petition in paragraph 6 described the train, alleged excessive speed, alleged that by reason of the terrain in the vicinity of Avondale Road, the angle or tangent at which said railroad crosses said road, color of the train, position of the sun, together with shortness of time said train is in view, "works against the timely observation of said train, and particularly against any reasonable judgment of the speed thereof, by a traveler on or near the crossing in question"; that in spite of high speed of trains the Avondale crossing was marked only by an old-fashioned cross-buck railroad crossing sign, that said sign is deceptive as to nature of dangers existing at said crossing. Paragraph 6 concluded as follows: "In connection with the dangers at the crossing here alleged, plaintiff would show that at the time herein complained of, defendant Railway Company had in its employ and regularly operating its fastest train, an elderly man, long past the age of retire-

ment and long past the age in life when the mental and physical faculties of an individual could or should be expected to function as foreseeably necessary and required of one operating such heavy, powerful locomotives at the high and excessive speeds required by defendant company; that such elderly engineer was operating train No. 15 and in full charge and control of the diesel electric multiple-unit controlled locomotive at the time herein complained of, and Grady Farris Robinson, deceased, was by defendant company negligently placed under the control, supervision and direction of said elderly engineer, and made subject to his orders and commands; that immediately before the collision herein complained of, defendant's locomotive, with its elderly engineer, came out of the curve one and one-half miles north of the Avondale School Road crossing at a speed approaching ninety miles per hour, and within sixty or a few more seconds later crashed into a heavy tank truck belonging to the County of Tarrant, as same was moving across defendant's track westward, with the resulting fatal injuries to Grady Farris Robinson, said engineer and the driver of said truck; that under all of the circumstances existing at said time and place, as hereinabove alleged, or a combination of any of said circumstances, defendant Railway Company negligently failed to furnish Grady Farris Robinson with a safe place to work, as required by law to do, and such failure was a proximate cause of his death and the resulting damage herein complained of."

Paragraph 7 alleged the crossing to be extra hazardous.

In paragraph 8 plaintiff plead: "Further and in addition to the above, and in the alternative if necessary, * * *"; then followed thirteen alleged acts of negligence on the part of defendant and its employees.

The jury found: (1) Defendant was not negligent in authorizing its engineers to operate locomotives at the point of collision at a speed of 84 miles per hour. (3) Defendant was not negligent in failing to mark the crossing in some manner to warn the public that trains passed at speeds as high as 84 miles per hour. (5) Defendant's engineer was not negligent in operating the train at a speed of 84 miles per hour. (7) The engineer did not fail to keep a proper lookout. (9) The engineer timely sounded the whistle. (11) He did not fail to timely apply the brakes on the train. (22) As between defendant and deceased the collision was an unavoidable accident. (24 and 25) Failure of the driver of the asphalt truck to keep a proper lookout was sole proximate cause of death of Robinson. (28) The driving of the asphalt truck on the railway track was the sole proximate cause of Robinson's death.

Plaintiff did not object to any of the issues submitted and does not now contend the answers are not supported by the evidence. She does contend that if the "safe place to work" issues had been submitted and answered favorably to plaintiff, such issues would have controlled over the findings exonerating defendant of specific acts of negligence. Had the issues been submitted, she argues, the jury

with its attention directed to all of the factors to be considered, might reasonably have found that defendant failed to provide its employee with a safe place to work, which finding would have precluded a finding that the negligence of the truck driver was the sole proximate cause.

The evidence shows that the truck driver and his helper had just finished lunch. The front end of the truck was facing the railroad at a distance of 47 feet. The helper told the driver to look for trains. Apparently the driver did look for trains. Immediately thereafter the driver started the truck and proceeded at about 2 miles per hour. The rear end of the truck was struck by the engine of defendant's train. The train was traveling at approximately 84 miles per hour. It was estimated the truck was in movement 21 seconds after starting until hit and the train traveled 2767 feet during the same 21 seconds. The truck could have stopped within 12 seconds and avoided the collision. The truck approached the crossing at a slight tangent, but the train came into view one and one-half miles north of the crossing. At the speed the train was traveling it would require 4505 feet for stopping after the brakes were placed in emergency, and the brakes would not take effect at such speed for 738 feet. The crossing in question was marked only by an old-fashioned cross-buck sign reading, "Railroad Crossing." There is no obstruction along the Avondale road approaching the railroad from the east, and no obstruction on the railroad tracks. There is an open view for over a mile where the train is at all times in full view of anyone in the position the truck was in from the

time it started until it reached the tracks. The Avondale road was a little used road. None of the witnesses had ever heard of a prior accident at the crossing in question. The train involved was of the newest and most improved type of railway equipment, including brakes. The fireman and the engineer were killed by burning asphalt from the truck. The defendant had no notice that the County had trucks at work on Avondale road. All the witnesses, called by both plaintiff and defendant, who knew the engineer, testified he was regarded as one of the best of engineers.

The defendant had ICC authority to make the particular section involved a high speed area. To meet the requirement the defendant installed a block train signal system, an automatic train stop control on its locomotive. No change was made affecting the Avondale crossing.

We agree with plaintiff the Federal Courts have broadened the jury's function in F. E. L. A. cases so that very little evidence is required to uphold a jury verdict of negligence. Bailey v. Central Vermont Ry., 319 U. S. 350; Rogers v. Missouri Pacific Railroad Co., 352 U. S. 500; Lavender v. Kurn, 327 U. S. 645; Deen v. Gulf, Colorado & Santa Fe Railway Co., 77 Sup. Ct. Rep. 715.

No doubt had the jury answered the issues submitted favorably to plaintiff this Court, in view of the above and many other cases, would hold that the evidence was sufficient to support findings of negligence.

But the question before us is not the same as if the court had instructed a verdict for the defendant or rendered a judgment notwithstanding the verdict. The question in this

case is whether the trial court adequately presented plaintiff's case to the jury.

In Arnold v. Panhandle & Santa Fe Railway Co., 353 U. S. 360, the United States Supreme Court held that the findings of the jury on special issues (favorable to defendant) did not exhaust all the possible grounds on which the prior finding of unsafe-place-to-work finding of the jury may have been based.

In the instant case our study of the three volumes of statement of facts convinces us the specific issues submitted did include all the grounds on which a finding of unsafe place to work finding could be based.

Like other cases tried in the state courts, F. E. L. A. cases will not be reversed unless the error complained of be of such nature that it "probably did cause the rendition of an improper judgment in the case," as contemplated by Rules 434 and 503, T. R. C. P. Thompson v. Robbins, Sup., 304 S. W. 2d 111.

We do not intend to hold, and do not hold, that it is improper in a F. E. L. A. case to submit a general issue on unsafe place to work and special issues on specific acts or omissions. We merely hold, under the whole record in the case before us, that the trial court did not deprive plaintiff of any substantive rights by refusing to submit the general issue of unsafe place to work, having concluded that the special issues properly and adequately presented all plaintiff's grounds on which there was evidence of unsafe place to work to the jury.

It is also our opinion, in view of the entire record, the trial court did not err in refusing to submit plaintiff's requested issue concerning defendant's failure to protect the train at the crossing by some character of warning device.

Plaintiff's last point complains of the failure of the court to give certain instructions to the jury after the jury, during its deliberations, had requested clarification of issue 3. We fail to see any error.

Judgment affirmed.

Thomas J. Renfro,
Associate Justice.

May 15, 1959

APPENDIX B

Judgments and Orders of the Courts Below

No. 15998

In the
COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS, AT FORT WORTH

HELEN MARY ROBINSON, ADMINISTRATRIX,
Appellant,

v.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY,
Appellee.

Opinion By Mr. Renfro, A.J.

May 15, 1959

This cause came on to be heard on the transcript of the record, and the same having been reviewed, it is the opinion of the Court that there was no error in the judgment. It is therefore ordered, adjudged and decreed that the judgment of the trial court in this cause be and it is hereby affirmed.

It is further ordered that Helen Mary Robinson, Individually and as Administratrix of the Estate of Grady Farris Robinson, Deceased, and her surety, Maryland Casualty Company, pay all costs in this behalf expended, for which let execution issue, and that this decision be certified below for observance.

No. 17019 15998

In the
COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS, AT FORT WORTH

HELEN MARY ROBINSON, ADMINISTRATRIX

v.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY

June 26, 1959

ORDER OVERRULING MOTION FOR REHEARING

This day came on to be heard the motion by appellant for a rehearing in this cause, and said motion having been duly considered by the Court is hereby overruled.

No. A-7460

In the
SUPREME COURT OF TEXAS

HELEN MARY ROBINSON, ADMINISTRATRIX

v.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY

From Tarrant County, Second District

October 7, 1959

ORDER REFUSING APPLICATION FOR WRIT OF ERROR

Application of petitioner for writ of error to the Court of Civil Appeals for the Second Supreme Judicial District having been duly considered by the Court, it is ordered that the application be, and hereby is, refused. It is further ordered that the applicant, Helen Mary Robinson, Individually and as Administratrix of the Estate of Grady Farris Robinson, Deceased, and her surety, Maryland Casualty Company, pay all costs incurred on this application.

No. A-7460

In the
SUPREME COURT OF TEXAS

HELEN MARY ROBINSON, ADMINISTRATRIX

v.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY

From Tarrant County, Second District

November 11, 1959

ORDER OVERRULING MOTION FOR REHEARING OF APPLICATION FOR WRIT OF ERROR

Petitioner's motion for rehearing of application for writ of error having been duly considered by the Court, it is ordered that said motion be, and hereby is, overruled.